IN THE HIGH COURT OF BOMBAY AT GOA, PANAJI-GOA

APPEAL FROM ORDER NO. 52 OF 2006
AND
CIVIL APPLICATION NO. 192 OF 2006

Reliance Infocom Ltd.,
A Company incorporated under
The provision of the Indian Companied Act, 1956
And having its Registered Office at
Avadesh House, 3rd floor
Preetam Nagar, Ellis Bridge,
Ahmedabad – 380 006,
And Branch Office at
Dempo Trade Centre, 4th Floor,
Patto Complex, Panaji – 403 001.
Represented by its Authorized
Signatory Mr. Suraj Lotlikar. (original plaintiff/applicant) .. Appellant

Versus

1. Shri Marcus Gracias Flor,
   H. No. 1239, Mazilvado,
   Benaulim, Salcete, Goa.

2. Shri Minguel Casitan Fernandes,
   Ascona, Benaulim,
   Salcete, Goa.
   (on behalf of himself and as
   representative of Residents
   of village of Benaulim,
   more particularly the residents of
   Ward Mazilvado and
   Ascona, Benaulim, Salcete, Goa.

3. Caetano M. Furtado,
   Married, agriculturist,
   Resident of Benaulim of
   Salcete Taluka. (original Defendants) .. Respondents

Shri S.D. Lotlikar, Sr. Adv. with Mrs. Shambhavi Rao, Advocate for Appellant.

Shri M.P. Almeida, Advocate for Respondents.

CORAM: **P.V. KAKADE, J**.

DATE: **21st August, 2006**

ORAL JUDGMENT

Heard learned Counsel for both the parties. Perused the record. Rule. Rule made returnable forthwith by consent.

2. The plaintiff which is a company incorporated under the provisions of the Indian Companies Act, 1956, and involved in the business of telecommunication, has filed this suit for permanent injunction against the defendants in their individual capacity and as representatives of the villagers of Benaulim and more particularly residents of Ward Mazilvado and Ascona, Benaulim, Salcete, Goa. Plaintiff claimed that the suit property bearing survey no. 272/9 belongs to one Mr. Honorato Velho who has given N.O.C. to the plaintiff permitting them to erect a Telecommunication Tower, BTS shelter and DG room in an area not exceeding 225 square meters at the south west side of the suit property bearing no. 272/9. Vide order dated 27/09/2004 the plaintiff sought permission from Margao

Planning and Development Authority and also received the technical approval for construction from the Assistant Engineer, Margao, on 8/10/2004. On 27/09/2004, the plaintiff applied to the Panchayat of Cana Benaulim for seeking necessary licence/permission to carry out the proposed construction and the Panchayat had received objection of defendant nos. 1 and 2 dated 26/09/2004 for which reply was sent and Panchayat meeting was held wherein it was resolved to issue licence and on 13/01/2005 a construction licence was issued. Defendant nos. 1 & 2 and other villagers of Benaulim objected construction and Panchayat issued notice dated 27/12/2004 asking defendant nos. 1 & 2 to remain present on 4/01/2005, though none remained present and on 5/02/2005 plaintiff received a letter from the Panchayat revoking the licence based on the resolution passed in a special meeting held on 3/02/2005. The said revocation order was challenged by the plaintiff in this Court on the statements made by the Panchayat to withdraw the revocation and issue a fresh show cause notice. The petition before this Court was disposed of and order of show cause notice dated 30/04/2005 was issued by the Panchayat which is allegedly on frivolous grounds that such Gram sabha has no authority to pass any order with respect to illegal construction and hence the suit came to be filed for permanent injunction. In the course of hearing,

an application was made for temporary injunction pending disposal of the suit to restrain defendants from entering the suit property bearing survey no. 272/9 of Benaulim Village, Salcete Goa and interfering with the construction carried out by the plaintiff.

3. The defendants challenged the application on various grounds, inter alia, denying the allegations made by the plaintiff and raising certain objections to the act of the plaintiff on various grounds including that raising of tower would create health hazard. It was further submitted that, their right of way through the property was involved and some tenancy rights of particular persons were also infringed and on such of the grounds application was sought to be dismissed.

4. Earlier, the trial Court after hearing both the parties rejected the plaintiff's application for injunction by order dated 19/09/2005. However, this Court by order dated 6/04/2006 in Appeal From Order No. 63 of 2005 remanded the matter, in so far as dismissal of the plaintiff's application for injunction was concerned and hence trial Court has heard the application after remand and has rejected the same by order dated 29/04/2006. Hence the present appeal.

5. After hearing both the parties and perusing the entire record, it is obvious that the learned trial Judge on the basis of letter of Dr. N.P.S. Varde came to the conclusion that the tower in question would not create any health risk and therefore, the contentions raised earlier in that regard are wiped of, in the sense that present respondents have not challenged that finding before this Court and hence the finding that telecommunication tower would not create health hazard has attained finality and therefore, I need not go into that aspect. Moreover, taking into consideration report of Dr. N.P.S. Varde, I am also independently of the view that such tower would not create any health hazard whatsoever to the respondents and to the villagers nearby.

6. The second contention which was sought to be raised on behalf of the respondent was with regard to the access through the property. However, that contention is also rejected by the trial Court. Moreover, there is no evidence on record to show that such right through the said property existed at any time in favour of the defendants. Similar would be the case regarding contentions raised through counter claim, relating to the alleged tenancy right in the suit property, in view of the finding recorded by this Court in Writ Petition.

7. The learned Counsel for the respondents brought to my notice, the finding recorded by the trial Judge to the effect that no prima facie case exists in favour of the plaintiff. It appears to be the view taken by the trial Court that since the ownership right of Honorato Velho was challenged by the third defendant in the suit as well as in the counter claim, claiming that third defendant is a tenant of the suit property and claims right of a tenancy in the suit, the owner of which is not coming forward to deny it. The trial Court further held that the plaintiffs are not disclosing their right in the suit property and hence it must be held that no prima facie case exists to seek temporary injunction. Now, in this regard one must note that the plaintiff has obtained all necessary and statutory licences/permissions in order to raise the tower. The contents of the plaint are also sufficient to show that the contract between the plaintiff and Mr. Velho subsists for which N.O.C. was issued in favour of the plaintiff on which basis the construction of tower is being made. The defendants at some places tried to deny the title of Mr. Velho to the suit property bearing survey no.272/9. However, for interim purpose the contents of the plaint alongwith the fact that the Panchayat itself had given N.O.C. earlier would show that the title is not seriously disputed and therefore, it cannot be an issue to hold that no prima facie case exists in favour of the plaintiff. I hold that plaintiffs have proved their

prima facie case to seek temporary injunction against the defendants. No irreparable injury would be caused to the defendants by granting permission to the plaintiff to raise the tower in the private property belonging to its owner and, therefore, the balance of convenience must tilt in favour of the plaintiff.

8. In view of these aspects, the rule is made absolute. Appeal is allowed with temporary injunction application made by the plaintiff in the said Special Civil Suit No. 62/2005/A is hereby allowed in terms of prayer clause (i) and appeal stands disposed of with no order as to costs. Consequently, the Civil Application also stands disposed of with no order as to costs.

P.V. KAKADE, J.

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